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In The

Supreme Court of the United States

October Term, 1993

CLARENCE VICTOR,

Petitioner,

vs.

STATE OF NEBRASKA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Nebraska

RESPONDENT'S BRIEF

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QUESTIONS PRESENTED FOR REVIEW

1. Was the state district court correct in refusing to consider a *Cage* due process claim in a state postconviction proceeding when petitioner had defaulted the issue at trial and on direct appeal?

2. Can *Cage* be retroactively applied to any case, given that *Cage* did not employ a "reasonable likelihood" test in evaluating the jury instruction in question?

3. If this Court should now reject the use of long accepted terms such as "to a moral certainty" in a reasonable doubt jury instruction, based upon a "reasonable likelihood" test, should *Griffith* be modified to prevent extraordinary disruption in state criminal justice proceedings?

4. Was the Nebraska Supreme Court correct in declining to address the retroactivity of *Cage* on the basis that Nebraska's reasonable doubt jury instruction is, in any event, constitutional?

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9 J. Wigmore, Evidence 325 (3d. ed. 1940) 24

Henry A. Diamond, Reasonable Doubt: To Define or Not to Define, 90 Colum.L.Rev. 1716 (1990) 25

J. P. McBaine, Burden of Proof: Degrees of Belief, 32 Cal.L.Rev. 242 (1944) 25

The American Heritage Dictionary (Second College Edition, 1982) 22

Webster's Third International Dictionary (Unabridged) (1981) 21, 22

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RESPONDENT'S BRIEF

OPINION BELOW

As resolution of this case involves questions which could have been, but were not, presented in the direct appeal of this case, the Court should have reference to ***State v. Victor***, 235 Neb. 770, 457 N.W.2d 431 (1990), ***cert. denied*** 498 U.S. 1127 (1991) as well as the opinions cited by the Petitioner.

STATEMENT OF THE CASE

Clarence Victor (hereinafter Victor) here attempts to raise, in a collateral state court proceeding, a challenge to

the reasonable doubt jury instruction given at his trial. This issue was clearly defaulted at his trial and in the course of his direct appeal.

A. The Petitioner

Clarence Victor kills people. Prior to the brutal slaying of elderly Alice Singleton in 1987 for which he currently stands convicted, Victor was convicted and incarcerated for two other homicides. Victor was convicted in 1964 of manslaughter and in 1976 of second degree murder. ***State v. Victor***, 235 Neb. 770, 777, 457 N.W.2d 431 (1990), ***cert. denied*** 498 U.S. 1127 (1991) (hereinafter "***Victor I***").

B. The Crime.

On December 26, 1987, Victor went to the home of 82-year-old Alice Singleton, a woman for whom he had previously done some gardening work. Victor confessed that upon entering the home:

> [H]e struck the victim with his hand and knocked her down and then struck her in the head three times with a pipe which he said he carried in his car for protection. He claimed that Singleton got tangled in some type of blue cord and that he used his pocketknife to cut the cord loose from her throat. Victor indicated that he then left Singleton's residence and, on his way home, threw away his pocketknife, the blue cord, and the pipe.

Victor I, 235 Neb. at 776. At trial a pathologist testified that, in addition to numerous bruises and rib fractures there were discovered:

> five lacerations to Singleton's neck and throat area, three of which penetrated deeply. They were caused by a sharp instrument. One penetrated to the depth of the victim's thyroid cartilage, or Adam's apple, about three inches. Dr. Roffman also noted that one of the lacerations was characterized by an irregular border. He stated that such an irregular border usually meant that there was not one quick stroke with a weapon, but some hesitation or "stopping and going" as the laceration was made.

Id. Alice Singleton's death was attributed to a laceration of a branch of the carotid artery. It took 3 to 5 minutes for her to bleed to death following that wound. ***Victor I***, 235 Neb. at 777.

C. The Course of These Proceedings Below.

Victor was convicted of first degree murder by a jury of the District Court of Douglas County, Nebraska. At trial Victor did not raise a Due Process Clause-based challenge to the reasonable doubt jury instruction given his jury as required by state procedures. Victor was later sentenced to death by a panel of judges called to determine the appropriate punishment for that crime.

Under Nebraska law Victor was afforded a mandatory direct appeal of his conviction and sentence to the Nebraska Supreme Court. ***Victor I***. "On appeal, Victor does not challenge the overwhelming evidence that sustains his convictions . . . " ***Victor I***, 235 Neb. at 773.

Neither did Victor argue a Due Process Clause-based defect in the reasonable doubt instruction given his jury. ***Id.***

After affirmance of his conviction and sentence on direct appeal Victor sought a petition for writ of certiorari from this Court. That petition did not raise a Due Process Clause-based challenge to the reasonable doubt jury instruction given at his trial. On November 13, 1990, while Victor's petition was pending, this Court released its decision in ***Cage v. Louisiana***, 498 U.S. 39 (1990). Victor's petition for a writ of certiorari was subsequently denied by this Court. ***Victor v. Nebraska***, 498 U.S. 1127 (1991).

On May 10, 1991, Victor next filed with the District Court of Douglas County, Nebraska a state postconviction proceeding. JA 20-25. In that proceeding Victor raised for the first time two claims relevant here: (1) That the reasonable doubt jury instruction given at his trial violated due process of law under ***Cage*** (JA 21-22, paragraph 4); and (2) That his trial and appellate counsel was ineffective in failing to raise that issue (JA 24-25, paragraph 11). In resolving Victor's state postconviction claims, the state trial court concluded that the decision in ***Cage*** "should not be applied retroactively" to Victor's case. JA 26.

Victor then appealed the denial of state postconviction relief to the Nebraska Supreme Court. By the time Victor's appeal came on for decision, the Nebraska Supreme Court had already considered the impact of the decision in ***Cage*** upon the identical reasonable doubt instruction given in Victor's case and found it did not

violate the Due Process Clause. See ***State v. Morley***, 239 Neb. 141, 474 N.W.2d 660 (1991). In resolving Victor's state postconviction appeal the Nebraska Supreme Court noted:

> We have repeatedly held that a motion for postconviction relief cannot be used as a substitute for an appeal or to secure further review of issues already litigated on direct appeal. *** [Victor's] only attempt to avoid the procedural bar of the previously raised issues is by asserting that he was denied effective assistance of counsel because trial and appellate counsel **improperly** raised these issues.

JA 34-35 (emphasis theirs). The Nebraska Supreme Court then resolved Victor's ***Cage*** claim in the following manner.

> In ***Morley***, we upheld the constitutionality of the reasonable doubt language of the Nebraska jury instruction, finding the language distinguishable from that found unconstitutional by the U.S. Supreme Court in ***Cage***. Therefore, whether or not trial and appellate counsel failed to object to or appeal the jury instruction . . . [is] now irrelevant, causing this assignment of error also to be without merit.

JA 35-36.

This Court subsequently granted Victor's petition for writ of certiorari from that decision on the question of whether ***Cage*** should have been given retroactive application in Victor's case.

D. The Instruction

The reasonable doubt jury instruction given Victor's jury reads as follows:

> "Reasonable doubt" is such a doubt as would cause a reasonable and prudent man, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon. It is such a doubt as will not permit you, after full, fair, and impartial consideration of all the evidence, to have an abiding conviction, to a moral certainty, of the guilt of the accused. At the same time, absolute or mathematical certainty is not required. You may be convinced of the truth of a fact beyond reasonable doubt and yet be fully aware that possibly you may be mistaken. The jury may find an accused guilty upon the strong probabilities of the case, provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable. A reasonable doubt is an actual and substantial doubt reasonably arising from the evidence, from the facts and circumstances shown by the evidence, or from the lack of evidence on the part of the State, as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture.

(JA 11, Instruction No. 9)

SUMMARY OF ARGUMENT

Griffith v. Kentucky basically held that on direct appeal "similarly situated" petitioners should be treated the same. Petitioner is not similarly situated to Cage because Cage raised a due process objection to the Louisiana jury instruction at trial while petitioner Victor failed to raise this issue at trial or on direct appeal and hence, defaulted the issue. Therefore, under ***Griffith v. Kentucky***, Petitioner is not entitled to retroactivity of this Court's decision in ***Cage v. Louisiana***.

Insofar as ***Cage*** rejects the use of various words and phrases in explaining a "reasonable doubt", it is not a precedent that can be retroactively applied to any case because it used a jury "could" test rather than a "reasonable likelihood" test.

If Petitioner is entitled to retroactive application of ***Cage*** under ***Griffith v. Kentucky***, this Court should carve out an extraordinary disruption exception to ***Griffith*** in this case. While this Court established a basic rule of retroactivity in ***Griffith*** that may generally be workable, there are a few cases, such as the instant one, which have such widespread impact that they will produce an extraordinary disruption in the criminal justice system. Because the concept of reasonable doubt enters into every jury decision, a strict application of ***Griffith*** could result in tens of thousands of re-trials nationwide.

Finally, the Nebraska Supreme Court was correct when it unanimously upheld the constitutionality of Nebraska's reasonable doubt jury instruction. There is no reasonable likelihood that the Nebraska Instruction,

taken as a whole, was applied by the jury in an unconstitutional manner. ***Cage*** created no poison pills which automatically invalidate any reasonable doubt instruction. To do so would violate the "whole instruction" commandment of ***Estelle v. McGuire***.

The Nebraska Instruction is different from the ***Cage*** instruction in many ways, but most importantly because the Nebraska Instruction clearly and continuously focuses the jury's attention on the evidence, while ***Cage*** did not. While a phrase-by-phrase analysis is not an appropriate way to analyze a jury instruction, such an analysis would show the questioned phrases in the Nebraska Instruction have a strong basis in long established case law of this and other courts.

Nebraska's reasonable doubt jury instruction, unanimously upheld by the Nebraska Supreme Court following ***Cage***, and firmly rooted in long established case law, should not be struck down by this Court. However, if this Court does strike it down, it should do so only prospectively and this Court should not only tell Nebraska and the other 49 states what is wrong with our instruction but what a correct one looks like. Otherwise, there will be protracted litigation involving virtually every criminal jury trial as states write and rewrite reasonable doubt instructions until this Court approves one and lays the issue to rest. We are more than willing to explain reasonable doubt to our juries in any way the Constitution requires, but if Nebraska's present instruction does not do that, it is difficult to understand what instruction would.

ARGUMENT

Introduction

There is no doubt that the concept of "reasonable doubt" is the very bedrock of our system of criminal justice. Therefore, while great care must be taken to appropriately preserve and apply that concept in criminal trials, immeasurable chaos and confusion rumbles through the criminal courtrooms of this nation if that bedrock begins to shift. Do the decisions of this Court in ***Cage v. Louisiana***, 498 U.S. 39 (1990), ***Sullivan v. Louisiana***, ___ U.S. ___, 113 S.Ct. 2078 (1993), ***Boyde v. California***, 494 U.S. 370 (1990) and ***Estelle v. McGuire***, 502 U.S. ___, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) alter that bedrock concept? We think not. Yet the confusion resulting from ***Cage*** has, in and of itself, sent tremors through this country's criminal justice system. This is an opportunity to put that disquiet to rest.

This case presents the question whether this Court's ruling in ***Cage v. Louisiana***, 498 U.S. 39 (1990) should have retroactive application, in a state collateral proceeding, to a defaulted claim that Nebraska Pattern Jury Instruction 14.08, which defines the concept of "reasonable doubt" (hereinafter "Nebraska Instruction"), violates the Due Process Clause.

I.

THE STATE DISTRICT COURT WAS CORRECT IN REFUSING TO CONSIDER A *CAGE* DUE PROCESS CLAIM IN A STATE POSTCONVICTION PROCEEDING WHEN PETITIONER HAD DEFAULTED THE ISSUE AT TRIAL AND ON DIRECT APPEAL.

A.

This issue is in default

We do not believe that an issue defaulted on direct appeal is entitled to the retroactive application of any decision of this Court.

Victor did not raise a Due Process Clause-based objection to the Nebraska Instruction when given the opportunity to do so prior to his jury being instructed. Yet under Nebraska law it is clearly established that any objections to the nature or content of a proposed jury instruction **must be raised in the trial court** before that instruction is given the jury. Such a timely objection to a proposed jury instruction is not only crucial at trial but also crucial to the preservation of that issue for consideration of the Nebraska courts on appeal. ***Eg., State v. Van Ackeren***, 242 Neb. 479, ___ N.W.2d ___ (1993). Victor also did not raise a Due Process Clause-based objection to the Nebraska Instruction in the course of his mandatory direct appeal to the Nebraska Supreme Court (See ***Victor I***, 235 Neb. at 773), or in seeking a writ of certiorari from the affirmance of his direct appeal by the Nebraska Supreme Court. See ***Victor v. Nebraska***, No. 90-6259, ***cert.den.*** 498 U.S. 1127 (1991). It was not until **after** the

announcement of this Court's decision in ***Cage*** that Victor first sought to belatedly inject this issue into his case.[1]

Having failed to raise and preserve this issue in the course of his direct appeal, we now find ourselves in a state postconviction proceeding in which Victor seeks to collaterally attack his conviction by challenging the Nebraska Instruction by use of the decision in ***Cage***. Yet at this juncture again, Victor's effort runs afoul of reasonable state court procedural restrictions on the manner in which issues are to be presented the Nebraska courts.

> We have repeatedly held that a motion for postconviction relief cannot be used as a **substitute for [a direct] appeal** or to secure further review of issues already litigated on direct appeal.

JA 34-35 (emphasis added).

The question of the propriety of the Nebraska Instruction was defaulted, under well established state procedural rules, in Victor's direct appeal (including his petition for writ of certiorari to this Court), and in that condition his judgment of conviction and sentence thus became final without his having properly raised or preserved a Due Process Clause challenge to the Nebraska Instruction.

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[1] Victor claims to have attempted to amend his petition for writ of certiorari after the decision in Cage was released. As we will discuss below, this is an issue which must be raised before the trial court, not belatedly injected in an already pending petition before this Court.

Under state court procedures the only valid claim Victor may now forward is his claim of ineffective assistance of counsel. That is the issue which was resolved by the Nebraska Supreme Court on the basis that the Nebraska Instruction does not violate the Due Process Clause. The Nebraska Supreme Court held that Victor's claim that his trial and appellate counsel were ineffective for failing to raise a Due Process Clause challenge to the Nebraska Instruction was without merit as that court had previously determined that the Nebraska Instruction was appropriate under ***Cage***. JA 35-36.

B.

Two types of retroactivity

This Court has granted certiorari to consider whether ***Cage*** has retroactive application to Victor's case. We believe there exist two types of retroactive application identified by the rulings of this Court. **(1)** The retroactive application of decisions of this Court to cases which were not "final" when that decision was announced, as discussed in ***Griffith v. Kentucky***, 479 U.S. 320 (1987). **(2)** The more restrictive retroactive application of decisions of this Court announced in the collateral context of federal habeas corpus proceedings, as discussed in ***Teague v. Lane***, 489 U.S. 288 (1989). Under the facts of this case only the ***Griffith*** type of retroactivity is at issue here, and we believe a state court default plays a decisive role in resolving the equities and merits of this question.

C.

Victor is not entitled to the benefits of *Griffith*-style retroactivity.

1.

It is clear from this record that Victor's direct appeal from his conviction and sentence was not "final" under standards articulated by this Court when the decision in ***Cage*** was announced. ***Griffith***, 479 U.S. at 321, fn. 6. ***Griffith*** held that any "new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review . . . " ***Id.***, 479 U.S. at 716. At first blush this rule would appear to apply to Victor's case, but it does not.

In ***Griffith*** this Court was concerned with the "actual inequity" that results when only one of numerous **"similarly situated"** defendants becomes the chance beneficiary of a ruling of this Court upon a particular issue. ***Id.***, 474 U.S. at 713. See also ***Teague v. Lane***, 489 U.S. 311, 316 (1989). While there exists no chronological distinction between Victor's situation and that presented this Court in ***Griffith***, a pivotal distinction does arise from the fact that while Griffith wanted the retroactive benefit of the rule announced in ***Batson v. Kentucky***, 476 U.S. 79 (1986), he and Batson had **both** raised and preserved the **same** issue in the state courts and this Court at the **same** time. Their cases were **both** pending on petitions for a writ of certiorari on the **same issue** when ***Batson*** was decided. This is the very essence of how Batson and Griffith were "similarly situated."

Victor and Cage occupy a radically different relationship. A relationship not specifically addressed by this

Court in previous opinions. While Cage conceived of, raised and preserved his Due Process Clause challenge to Louisiana's reasonable doubt instruction in the trial and direct appeal of his conviction (See ***Cage***, 498 U.S. at 40), Victor did not. While Cage afforded his state trial and appellate court's the opportunity to rule upon his Due Process Clause claim, Victor did not. While Cage was before this Court urging his Due Process Clause Claim, Victor was before this Court arguing **entirely different issues**. Under these circumstances, not one of the equities recognized as being present in ***Griffith*** are present here to urge retroactive application of ***Cage*** to Victor's case. By defaulting this issue before the state trial and appellate courts in the course of his direct appeal, Victor distinguished himself from ***Griffith*** and put himself in a distinct class occupied by tens of thousands of state prisoners in the United States who did not raise this issue at trial five or ten or twenty years ago, but wish to do so now.

2.

In ***Griffith*** this Court noted the appropriate remedy when cases pending on direct appeal are "similarly situated". "We fulfill our judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final." ***Id.***, 479 U.S. at 713. Why then did this Court **not** employ such a remedy when Victor's direct appeal was pending before this Court at the same time as Cage's?

We assume Victor's petition for a writ of certiorari was denied in Victor's direct appeal exactly because

Victor was not before this Court raising the same issue presented in ***Cage***. By his failure to conceive of, raise and preserve his Due Process Clause challenge to the Nebraska Instruction in the Nebraska courts in the process of his direct appeal, Victor's direct appeal became final upon denial of his petition for writ of certiorari without obtaining review of his now belatedly urged ***Cage*** claim. Under this circumstance Victor is not entitled to the type of retroactivity discussed in ***Griffith*** because he was never "similarly situated" with Cage before that case was decided by this Court.

D.

The unnecessary burden of retroactively applying *Cage*.

In every criminal case which has ever gone to a jury in the history of this nation the term reasonable doubt has had to be employed. We do not even attempt to guess how many tens of thousands of jury verdicts now hang in the balance since the decision in ***Cage*** was announced. Even more mind boggling would be the number of pre-***Cage*** verdicts which potentially face post-***Cage*** examination and possible retrial unless reasonable limits are placed upon that decision's application.

The appropriate focus of the American criminal justice system has to be the trial courts. Trial courts are where the criminal law of this land is principally dispensed to the mass of the American people, not in the more heady environments of state appellate courts, and federal habeas corpus litigation. If error is to be identified, it should be identified, objected to, and resolved at

the trial court level based upon the law applicable at the time of trial. The application of new precedent at any other juncture needlessly diminishes the crucial role of the trial in our jurisprudence. See ***Griffith*** and ***Teague***. Furthermore, from a systemic standpoint, such a rule needlessly imposes significant retrial costs upon society, likely will cause the release from custody of many of the worst individuals our criminal justice system has been able to identify and isolate, and thus will ultimately reduce the public safety.

Language which had previously been approved or deemed unworthy of reversal by this Court has now been called into question by ***Cage***. Yet prior to ***Cage***, state trial courts such as those in Nebraska employed jury instructions which were the product of the diligent efforts of both the bench and bar in an absolute good faith belief such instructions accurately represented the law of this land.[2]

The same equities and interests in finality which this Court has previously recognized as mitigating against retroactivity in federal collateral proceedings, carry equal

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[2] States employing reasonable doubt instructions which contained the phrases "moral certainty" or "substantial doubt" or both prior to the decision in Cage: Alabama (*), Alaska (*), Arizona (sd), California (*), Connecticut (sd), Delaware (sd), Georgia (*), Idaho (mc), Illinois (mc), Kentucky (sd), Louisiana (*), Maryland (mc), Massachusetts (mc), Michigan (mc), Mississippi (mc), Missouri (sd), Montana (*), New York (mc), North Carolina (*), North Dakota (mc), Oklahoma (mc), Oregon (*), Rhode Island (*), South Carolina (*), South Dakota (mc), Tennessee (*), Texas (mc). "mc" = moral certainty. "sd" = substantial doubt. * = both.

weight with respect to Victor's state court collateral attack upon his conviction. He attempts to inject a clearly defaulted issue as the basis for obtaining a retrial of his guilt. This Court has regularly recognized the problems inherent in crediting such an attempt. See ***Griffith***; ***Teague***.

E.

Impact of this decision on subsequent federal collateral review.

Should Victor's conviction and sentence be sustained here, his case will next surely ripen into a federal habeas corpus proceeding. We urge this Court, in the context of resolving this issue, to give clear notice that an individual who cannot show entitlement to the benefit of ***Griffith***-style retroactivity can **never**, through the ***Teague*** exceptions, obtain retroactive application of new law to his already final conviction.

II.

CAGE'S CONCERN WITH CERTAIN WORDS USED IN A REASONABLE DOUBT JURY INSTRUCTION CANNOT BE RETROACTIVELY APPLIED TO ANY CASE BECAUSE *CAGE* DID NOT USE A "REASONABLE LIKELIHOOD" TEST.

If Victor's default does not dispose of this case, then we must ask whether ***Cage***, to the extent that it addresses only particular phrases within a jury instruction, currently represents the law of this county applicable to evaluation of jury instructions defining reasonable doubt. We believe that subsequent decisions of this Court have

so altered the standards of appellate review of such questions that *Cage* no longer offers credible guidance in any case. If we are correct in that conclusion, then *Cage* certainly should not be afforded retroactive application to this case.

We note that this Court in deciding *Cage*, as well as the Nebraska Supreme Court in deciding *State v. Morley*, 239 Neb. 141, 474 N.W.2d 660 (1991), employed the standard of review for evaluating jury instructions described in *Francis v. Franklin*, 471 U.S. 307, 316 (1985). This Court has since specifically rejected the continued use of that standard of review as being too speculative. *Boyde v. California*, 494 U.S. 370 (1990); *Estelle v. McGuire*, ___ U.S. ___, 112 S.Ct. at 482 n.4 (1991); and *Johnson v. Texas*, ___ U.S. ___, 113 S.Ct. 2658, 2669 (1993).

We urge this Court to consider that the change in appellate standard of review established by *Boyde* and *Estelle v. McGuire* is material and significant, and standing alone might well have dictated a different result in *Cage*, much less in the present case. See *Sullivan*, 113 S.Ct. at 2081 n.1. While the basic principle applied in *Cage*, that due process requires an appropriate explanation of the term "reasonable doubt", unquestionably remains the law, the constitutional appropriateness of the jury instruction questioned in *Cage* is necessarily an open question since those words were judged by a "could have" standard rather than a "reasonable likelihood" standard. Since *Cage* used a now rejected standard to evaluate terms such as "moral certainty", it cannot now be deemed authoritative precedent regarding the constitutionality of those terms and hence, clearly should not

be applied retroactively in so far as it rejected any particular phrase or group of phrases used to define a reasonable doubt.

III.

IF THIS COURT NOW REJECTS THE USE OF LONG ACCEPTED PHRASES SUCH AS "TO A MORAL CERTAINTY" TO DEFINE BEYOND A REASONABLE DOUBT, BASED UPON USE OF THE "REASONABLE LIKELIHOOD" TEST, *GRIFFITH* SHOULD BE MODIFIED TO PREVENT EXTRAORDINARY DISRUPTION IN STATE CRIMINAL JUSTICE PROCEEDINGS.

We do not believe Victor is entitled to the benefits of *Griffith*-style retroactivity. We further believe that when concepts as fundamental and oft employed by our courts as reasonable doubt are called into question, that strong policy arguments exist for only prospective application of such decisions even among those cases similarly situated and not final.

The courts of this nation have proceeded to create their reasonable doubt jury instructions without definitive guidance from this Court and in good faith reliance upon prior related rulings of this Court. As this Court noted in *Boyde* and *Estelle v. McGuire* we are here, at best, dealing with after-the-fact judicial speculation as to the impact of the language in question upon a jury. This Court has previously discussed the easily anticipated disruption of our judicial system which results from retroactive application of such speculation.

> Such probabilities must in turn be weighed against the prior justified reliance upon the old

> standard and the impact of retroactivity upon the administration of justice.

Stovall v. Denno, 388 U.S. 293, 387 (1967). See also ***Griffith***, 479 U.S. at 329-334. (Chief Justice Renhquist, dissenting. Justice White, dissenting.)

We cannot imagine any ruling having a more pervasive impact upon the criminal justice system of this country than to expose every jury instruction on reasonable doubt to retroactive scrutiny. The disruption to the criminal justice system of this country of such a ruling would be incalculable, and surely mitigates in favor of an extraordinary disruption exception to the general rule of retroactivity established by ***Griffith*** under these unique circumstances.

IV.

THE NEBRASKA SUPREME COURT WAS CORRECT IN DECLINING TO ADDRESS THE RETROACTIVITY ISSUE BECAUSE NEBRASKA'S REASONABLE DOUBT JURY INSTRUCTION IS, IN ANY EVENT, CONSTITUTIONAL.

A.

DEFINING "REASONABLE DOUBT"

1.

The Nebraska Instruction must be evaluated in light of the requirements of the Due Process Clause, yet ***Cage*** offers no definition of the phrase "reasonable doubt" by which to judge this case. ***Cage*** merely informs us that one definition, evaluated under a now disapproved standard, failed in the attempt.

While Victor and other opponents of the ***Cage*** phrases send us to our dictionaries to review the common meaning of the questioned phrases, their effort to seek from the same sources a functional definition of the pivotal phrase – reasonable doubt – is conspicuous by its absence.

The basic proposition is this: If a jury, after considering the evidence, has a **reasonable doubt** as to the defendant's guilt, the jury must acquit. See JA 12, Instruction No. 10.

We begin, then, with the noun "doubt".

> [T]he subjective state of being uncertain of the truth of a statement or the reality of an event as a result of incomplete knowledge or evidence.

Webster's Third International Dictionary (Unabridged) (1981). However, "doubt" is not enough. The "doubt" must be "reasonable" which is defined as: "Being in agreement with right thinking or right judgment: not conflicting with reason: not absurd: not ridiculous." ***Id.*** Therefore, a jury must acquit any defendant where there exists a subjective state of uncertainty as to the defendant's guilt which is (1) based upon the evidence and (2) neither illogical, absurd or ridiculous. The term "reasonable doubt" is itself defined as:

> solid doubt about the actual guilt of a defendant that arises or remains after careful and impartial examination of the evidence.

Id.

On the other hand a jury cannot convict a defendant unless the government, based upon the evidence, has

established a defendant's guilt "beyond" a reasonable doubt. See JA 7, Instruction No. 1, Section I. That is: the government's evidence has convinced the jury of a defendant's guilt "to a degree or amount greater than" any doubt which is reasonable. The American Heritage Dictionary (Second College Edition, 1982)

We are here concerned with identifying a particular quantum of "doubt", we are never concerned with "certainty". For example, unless "moral" is read to imply a belief based upon something other than the evidence, then establishing a defendant's guilt to a "certainty" – moral or otherwise – is a much **greater** burden than that imposed upon the government by the Due Process Clause, because "certainty" means "believed without reservation or doubt" and that is **not** the constitutional standard for conviction. See Webster's Third International Dictionary (Unabridged) (1981).

2.

For instruction on the meaning and purpose of the concept of reasonable doubt *Cage* directs our attention to this Court's opinion in ***In re Winship***, 397 U.S. 358 (1970).

In *Winship* this Court noted: "The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation." ***Id.*** at 361. "The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting upon **factual error**." ***Id.*** at 363 (emphasis added).

While the majority opinion in ***Winship*** addressed the constitutional significance of the concept of guilt beyond a reasonable doubt, it too failed to define the concept. However, some guidance on the question was provided by the concurring opinion of Mr. Justice Harlan which addressed the concept and complications of defining "reasonable doubt", as well as the fundamental goal that concept is intended to achieve.

> [A] standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.

Id. at 370.

In this country's legal system there exist two primary standards of proof: (1) a preponderance of the evidence and (2) proof beyond a reasonable doubt. ***Winship*** teaches that what we attempt to do in a criminal case by employing the phrase "reasonable doubt" is to impress upon the factfinder the concept that something **more** than a preponderance of the evidence is required to deprive an individual of his liberty. The sole purpose of the concept of reasonable doubt is to reduce the "error in factfinding" inherent in any trial to a level acceptable to society. See ***Speiser v. Randall***, 357 U.S. 513, 525-526 (1958). However, a coherent explanation of **how much more** than a preponderance of the evidence is required or how to describe it accurately to a lay jury has not been forthcoming.

> The truth is that no one has yet invented or discovered a mode of measurement for the intensity of human belief. Hence there can be yet no successful method of **communicating**

> **intelligibly** . . . a sound method of self-analysis for one's belief,

(emphasis added) 9 J. Wigmore, Evidence 325 (3d. ed. 1940). ***Id.*** at 369 (Mr. Justice Harlan, concurring.) Yet communicating intelligibly and accurately the concept of reasonable doubt to a lay jury is exactly the challenge created by ***Cage***.

B.

THE RISK OF NOT DEFINING REASONABLE DOUBT UNDER *BOYDE*

Some courts have required that juries determine the innocence or guilt of criminal defendants with **only** the benefit of the words "reasonable doubt" to guide them, and ***Cage*** would appear to encourage that practice. See ***United States v. Moss***, 756 F.2d 329, 333 (4th Cir. 1985) "District courts are again admonished not to define reasonable doubt in their jury instructions," cited with approval in ***Cage***, 498 U.S. at 41.

We do not hesitate to suggest that the concept of reasonable doubt, standing alone, has little meaning to most people. As jurists and lawyers we may think we understand that phrase (after years of study and consideration), but under ***Boyde*** that is **not** the test. The test is the commonsense understanding of those words by a lay jury. Yet if one applies ***Boyde*** to an "undefined" context we believe there exists a very "reasonable likelihood" that a lay jury given only the words "reasonable doubt" to guide them would glean little meaning or an inappropriate meaning from those two bare words standing alone.

> If each juror is allowed to decide guilt based on [his or her] own, individual understanding of what is meant by reasonable doubt there is no way to ensure that the proper standard is applied.

Henry A. Diamond, ***Reasonable Doubt: To Define or Not to Define***, 90 Colum.L.Rev. 1716 (1990). See also J. P. McBaine, ***Burden of Proof: Degrees of Belief***, 32 Cal.L.Rev. 242 (1944).

The problem of accurately defining reasonable doubt under the Due Process Clause is vexatious. Do we turn juries loose to manufacture, by numberless committees of twelve, a numberless variety of lay definitions of reasonable doubt without judicial assistance, or do we afford the trial courts of this country the deference afforded by the ***Boyde*** and ***Estelle v. McGuire*** standard of review in their good faith efforts to define that which has not been defined by this Court, or does this Court now undertake the responsibility of offering a definition of reasonable doubt for the **prospective** use of the courts of this country? We strongly urge this Court to undertake one of the two latter alternatives.

C.

DISTINGUISHING THE NEBRASKA INSTRUCTION FROM *CAGE*

Contrary to "uninstructed" jurisdictions, the State of Nebraska has gone to considerable good faith effort to impress upon its jurors the significance of the burden placed upon the state to establish the guilt of the accused. JA 2-17.

The lesson of ***Winship*** is that the fundamental concern of the Due Process Clause is the accuracy of the factfinding process – that a jury must be impressed by the fact that the government's burden is great **and** that the jury's decision must be based upon the evidence before them. If a jury is likely to believe, once instructed, either that the state's burden is nothing more than a preponderance of the evidence **or** that it may appropriately resolve the matter before it based upon suspicion or belief arising from something **other than** the evidence before it, then clearly error of the most fundamental nature has occurred.

What does the Nebraska Instruction accomplish in defining reasonable doubt that the instruction considered in ***Cage*** did not? Generally, the Nebraska Instruction, taken as a whole, defines the concept of reasonable doubt in a constitutionally appropriate manner. The Nebraska Instruction clearly focuses the jury's attention upon the **evidence** in the case, as opposed to the instruction in ***Cage***, where speculation could lead one to conclude that a conviction could result based upon something **other** than a jury's evaluation of the evidence before it.

As we will discuss below in greater detail, there exists no doubt that Victor's jury knew the state was required to convince them of Victor's guilt beyond a "reasonable doubt", and that they were required to determine Victor's innocence or guilt based **solely** upon a review of the evidence before them. The Constitution requires nothing more.

D.

THE FRAMEWORK OF DECISION

Our analysis of the Nebraska Instruction begins with three thoughts. First, as noted above in ***Boyde***, strong public policy interests argue against forcing the release or retrial of convicted criminals based solely upon judicial speculation – occurring long after the fact – of the possible thought processes of a jury.

Second, "[a]ttempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury." ***Miles v. United States***, 103 U.S. 304, 312 (1880). Yet today ***Boyde*** instructs us that it is solely the "minds of the jury" about which we are required to speculate.

Third, ***Boyde*** gives us this insight as to how we, as judges and lawyers, should view and credit the mental processes of the jury.

> [j]urors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers [or judges] might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with ***commonsense*** understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.

Boyde at 494 U.S. 381. (Emphasis added).

E.

THE APPROPRIATE STANDARD OF REVIEW

1. The reasonable likelihood test

The appropriateness of the Nebraska Instruction will be governed by the test announced by this Court in ***Boyde v. California***, 494 U.S. 370 (1990) and ***Estelle v. McGuire***, 502 U.S. ___, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) for evaluating an allegedly inaccurate jury instruction. That test being "whether there is a reasonable likelihood that the jury has applied the challenged instruction" in an inaccurate manner. ***Boyde***, 494 U.S. at 380. In adopting this standard, this Court noted the policy considerations which support the heavy burden placed upon the complaining party.

> There is, of course, a strong policy in favor of accurate determination of the [question before the jury], but there is an equally strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation.

Id. (emphasis added).

2. Instructions must be evaluated as a whole

"It is well established that the instruction may not be judged in artificial isolation, but must be considered in the context of the instructions as a whole and the trial record." ***Estelle v. McGuire***, ___ U.S. ___, 112 S.Ct. 475, 482 (1991); citing ***Cupp v. Naughten***, 414 U.S. 141, 147 (1973).

The jury instructions given in Victor's case make over a dozen references to the fact that the jury could not find Victor guilty unless convinced beyond a reasonable doubt of his guilt. (JA 2-14) In each instance the concept of reasonable doubt is directly and solely tied to the jury's evaluation of the **evidence** before it. These instructions as a whole do not violate the Due Process Clause.

3. *Cage* created no "poison pills"

Cage expressed concern with three phrases contained within the Louisiana reasonable doubt instruction: (1) "grave uncertainty; (2) "actual substantial doubt"; and (3) "moral certainty". After noting the presence of the first two phrases, the ***Cage*** opinion states:

> When those statements are then considered with the reference to "moral certainty," rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.

Cage, 498 U.S. at 41.

We draw two immediate conclusions from that language. First, it was the use of these phrases **in the aggregate** and **exactly** as Louisiana employed them which then violated the Constitution. It is illogical to assume that ***Cage*** created three "poison pills" which, in any context, destroy the validity of a challenged instruction. Such a construction would completely ignore the "whole instruction" commandment of ***Estelle v. McGuire***. Each

challenged instruction must rise or fall upon the merits of its individual syntax and context.

Second, that if any particular phrase contained in the Louisiana instruction was pivotal to its invalidity, it was the **manner** in which that instruction employed the phrase "moral certainty". It appears it was Louisiana's unique use of that phrase which lead this Court to conclude, under the ***Francis v. Franklin*** test, that a conviction under the Louisiana instruction could have been arrived at **without** "evidentiary certainty". We agree that any jury instruction which would allow a verdict based upon anything other than the evidence is fundamentally corrupt.

However, neither of these infirmities infect the Nebraska Instruction or the individual phrases discussed below.

F.

MORAL CERTAINTY

The Nebraska Instruction contains the following sentence:

> [Reasonable doubt] is such a doubt as will not permit you, after full, fair, and impartial consideration of all the evidence, to have an abiding conviction, to a moral certainty, of the guilt of the accused.

JA 11, Instruction No. 9.

1.

The use of the term "moral certainty" to impress upon jurors the gravity of their decision and the significance of the government's burden of proof has historical precedent before this Court. The concept appears to have first arisen in ***Commonwealth v. Webster***, 5 Cush. 295, 320 (1850) and was cited with approval in ***Perovich v. United States***, 205 U.S. 86, 92 (1906). In ***Miles v. United States***, 103 U.S. 304, 309 (1880) this Court stated:

> Proof beyond a reasonable doubt is such as will produce an abiding conviction in the mind **to a moral certainty** that the fact exists that is claimed to exist, so that you feel certain that it exists.

(emphasis added)

> 'I am convinced [all evidence considered and weighed] of the defendant's guilt to a moral certainty.' If you can say that you have such a conviction, then you have no reasonable doubt, and your verdict should be guilty.

Wilson v. United States, 232 U.S. 563, 570 (1914). In ***Fidelity Mutual Life Ass'n. v. Mettler***, 185 U.S. 308, 317 (1901) this Court stated: "Proof to a 'moral certainty' is an **equivalent** phrase with 'beyond a reasonable doubt'. [citations omitted]" (emphasis added)

Language almost identical to that contained in the Nebraska Instruction was approved in ***Agnew v. United States***, 165 U.S. 36, 51 (1896).

> By a reasonable doubt is not meant a possible doubt, but such a doubt arising from the evidence that leaves the minds of the jury in such a

> state that they cannot say, after having reviewed all the evidence, that they have an abiding conviction, to a moral certainty, of the guilt of the accused.

Compare JA 11, Instruction No. 9.

All of these definitions or descriptions of reasonable doubt have this in common: In each instance the "moral certainty" of the defendant's guilt was specifically tied to the evidence in the case. That is exactly what is done by the Nebraska Instruction, and what was apparently not accomplished by the instruction in ***Cage***.

Until ***Cage*** there existed significant **support** in the opinions of this Court for employing the phrase "moral certainty" to accurately define the concept of reasonable doubt, and we believe, if taken in the appropriate context, that support remains unaltered by ***Cage***. It is a verdict tied to the evidence and one that reflects the significance of the government's burden of proof which is required by the Constitution and, **used properly**, the concept of "moral certainty" accomplishes both of those goals. In the Nebraska Instruction the concept of "moral certainty" was employed properly and accurately to the end that the goals of the Due Process Clause were achieved.

The "moral certainty" cases cited with approval in ***Cage*** offer little assistance here. ***United States v. Indorato***, 628 F.2d 711 (1st Cir. 1980) did not find the use of the term "moral certainty" in that reasonable doubt instruction to be reversible error. The instruction given by the trial court in ***United States v. Byrd***, 352 U.S. 570 (2nd Cir. 1965) is so grammatically incomprehensible as to require reversal because it is unintelligible.

In addition, we find no support for the proposition the phrase "moral certainty", standing alone, violates the Due Process Clause. The ultimate question under the Due Process Clause is whether such phrases, in the aggregate, violate the Constitution.

For lower court cases regarding this phrase, see Addendum 1.

2.

Furthermore, while both the Nebraska Instruction and the ***Cage*** instruction contain the phrase "moral certainty", the use of that phrase within the two instructions is facially and radically different.

We believe a fair reading of the Louisiana instruction's use of the phrase "moral certainty" is: "What is required [to convict] is not an absolute or mathematical certainty, but a moral certainty." ***Cage***, 498 U.S. at 40. Not once does this sentence focus the attention of the Louisiana jury upon the evidence before them. In this unique context, one might speculate that a jury could conclude that a "moral" intuition of the defendant's guilt, as opposed to a belief based upon the evidence before them, would suffice to support a verdict of guilty. Such a possibility must have prompted this Court to state:

> When those statements are then considered with the reference to "moral certainty," **rather than evidentiary certainty**, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a

> degree of proof below that was required by the Due Process Clause.

Cage, 498 U.S. at 41 (emphasis added).

In contrast, the Nebraska Instruction informed Victor's jury:

> [A reasonable doubt] is such a doubt as will not permit you, **after full, fair, and impartial consideration of all the evidence**, to have an abiding conviction, to a moral certainty, of the guilt of the accused.

(JA 11, Instruction No. 9. Emphasis added.) As opposed to the Louisiana instruction, under the Nebraska Instruction the "moral certainty" of the accused's guilt can have but one source – it can arise only "after full, fair and impartial consideration of all the evidence." Under the Nebraska Instruction "moral certainty" of the guilt of the accused is the **product of evidentiary certainty**, not the antithesis of it.

"Moral certainty" in this context, where within the same sentence the jury is informed a reasonable doubt "will not permit" conviction of the accused, demonstrates the **gravity** of the belief in the defendant's guilt the juror must possess to convict. It in no respect lightens the government's burden of proof or directs the attention of the jury away from the evidence in arriving at its verdict.

3.

Considering these instructions as a whole, as we are required to do, produces even more evidence that

Victor's jury was clearly instructed to avoid any non-evidentiary basis for their verdict.

> In determining any questions of fact presented in this case, you should be governed **solely by the evidence** introduced before you. You should not indulge in speculation, conjectures, or inferences not supported by the evidence.

JA 2, Instruction No. 1 (emphasis added).

In addition, the Nebraska Instruction itself contains language specifically informing the jury that its verdict cannot be based upon "mere possibility, from bare imagination, or from fanciful conjecture." JA 11, Instruction No. 9.

4.

Finally, this portion of the instruction is **cautionary** in tone. It tells jurors **not** to convict unless their full, fair and impartial consideration of all the evidence convinces them of the defendant's guilt.

> "[W]hile a reasonable reading of the *Cage* instruction leads one to the conclusion that an accused is to be ***convicted*** unless such doubt rises to the level of moral certainty, the [Nebraska] instruction permits conviction only if the **lack** of such doubt is established to a moral certainty . . . "

State v. Morley, 239 Neb. at 155, 474 N.W.2d at 670 (Emphasis added).

> In other words, under the *Cage* instruction a juror is to vote for ***conviction*** unless convinced

> to a moral certainty that there exists a reasonable doubt, whereas under the [Nebraska] instruction a juror is to vote for ***acquittal*** unless convinced to a moral certainty that no reasonable doubt exists. Those are two very different instructions; indeed, one contradicts the other.

Id. (emphasis added).

G.

ACTUAL AND SUBSTANTIAL DOUBT

Both the ***Cage*** instruction and the Nebraska Instruction utilize the words "actual, substantial, doubt." In the Nebraska Instruction those words are employed in the following context:

> A reasonable doubt is an actual and substantial doubt reasonably arising from the evidence, from the facts and circumstances shown by the evidence, or from the lack of evidence on the part of the State, as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture.

JA 11, Instruction No. 9. In contrast, the ***Cage*** instruction simply stated: "[A reasonable doubt] is an actual substantial doubt." ***Cage***, 498 U.S. at 40.

1.

The ***Cage*** opinion offers little analysis of exactly how the Court found this phrase offensive to the Due Process Clause, and ***Taylor v. Kentucky***, 436 U.S. 478 (1978), cited with approval in ***Cage***, specifically **did not find** the use of that phrase, standing alone, reversible error.

Two conclusions can be drawn from these facts. First, it is the presence of these words **in conjunction with** other troublesome language within an instruction that may ultimately cause the Due Process Clause to be violated, not that phrase standing alone. Second, the **exact** use of that language within an instruction in each instance will be pivotal to properly resolving the constitutional question.

2.

Again, what initially distinguishes this portion of the Nebraska Instruction from the Louisiana instruction, is the constant emphasis the Nebraska Instruction places upon the jury's reliance upon the **evidence** in the case. The Nebraska Instruction goes to greater effort than did the Louisiana instruction to assure the "evidentiary certainty" required by ***Cage***.

The Louisiana instruction directly equates "reasonable doubt" with "actual, substantial doubt", which under the Louisiana instruction's reliance upon the potentially non-evidentiary based concept of "moral certainty" might well result in a verdict having no reference to the evidence in the case at all.

In stark contrast is the language of the Nebraska Instruction which **never** allows the jury's attention to drift from the evidence before them.

For lower court cases regarding this phrase, see Addendum 2.

H.

GRAVE UNCERTAINTY

First, we note the Nebraska instruction contains only two of the three phrases questioned in ***Cage***. The Nebraska Instruction does not employ the phrase "grave uncertainty" in any context. In ***Cage*** apparently the effect of the questioned phrases were evaluated by this Court in the aggregate. If that is the appropriate analysis, then the absence of one of those phrases from the Nebraska Instruction alone distinguishes it from the instruction reviewed in ***Cage***.

Second, the grammatical use of the remaining phrases within the Nebraska Instruction, on its face and as interpreted by the Nebraska Supreme Court, is the antithesis of the Louisiana instructions struck down in ***Cage***. See ***State v. Morley***, 239 Neb. 141, 474 N.W.2d 660 (1991).

Third, the Nebraska Instruction repeatedly and clearly focused the attention of Victor's jury solely upon the evidence before them and created **no reasonable likelihood** that Victor's jury based its verdict on anything other that the evidence before them.

I.

STRONG PROBABILITIES

Victor here also complains of the Nebraska Instruction's use of the phrase "strong probabilities of the case". This language was never at issue in ***Cage***.

The sentence of the Nebraska Instruction containing this phrase reads as follows:

> The jury may find an accused guilty upon the strong probabilities of the case, **provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable**.

JA 11, Instruction No. 9. (Emphasis added.)

1.

Frankly, we have difficulty grasping Victor's concerns with this language. Victor argues that the use of the this phrase allows a jury to reach a verdict on "a presumption of guilt rather than proof of guilt" and that this language allows conviction by a preponderance of the evidence rather than beyond a reasonable doubt. Petitioner's Brief, p. 23-26. The very sentence within which the contested phrase is found belies that contention.

> The jury may find an accused guilty upon the strong probabilities of the case, **provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable**.

JA 11 (emphasis added).

2.

Victor confuses the government's burden of proof with the legitimate uses to which evidence may be put to **meet** that burden. In that context other instructions given Victor's jury are relevant. Instruction No. 1 states, in part:

> In determining questions of fact presented in this case, you should be governed solely by the

> evidence introduced before you. *** Each of you may apply to the subject before you that general knowledge which anyone of you may be presumed to have . . .

JA 3. Instruction No. 11 addressed direct and circumstantial evidence and stated, in part:

> Evidence is circumstantial when it relates to the existence or nonexistence of facts from which a material element of the crime charged may be inferred and when that inference usually and reasonably follows according to the common experience of mankind.

JA 12. Instruction No. 10 concerns the element of intent and instructs the jury, in part:

> [Intent] is rarely – if ever – susceptible of proof by direct evidence. It may, however, be inferred from the words and acts of the defendant and from the facts and circumstances surrounding his conduct. But before intent can be inferred from such circumstantial evidence alone, it must be of such character as to exclude every reasonable conclusion except that the defendant had the required intent.

JA 12. "The burden is **always** on the State to prove beyond a reasonable doubt all of the material elements of the crime charged, and this burden **never shifts**." JA 8. (emphasis added).

We believe these instructions, individually and taken as a whole, represent an accurate statement of the law, and do nothing to distract from the constitutionally required level of evidentiary certainty necessary to convict Victor of his crimes.

3.

Even if the Nebraska Instruction had equated reasonable doubt with the "strong probabilities of the case", this Court has upheld such an instruction.

> It is urged that the court failed to instruct the jury as to what constitutes a reasonable doubt, and that in speaking of it it used the term "strong probabilities." . . . And so, when the court in this case said to the jury, "I will not undertake to define a reasonable doubt further than to say that a reasonable doubt is not an unreasonable doubt – that is to say, by a reasonable doubt you are not to understand that all doubt is to be excluded; it is impossible in the determination of these questions to be absolutely certain. You are required to decide the question submitted to you upon the **strong probabilities** of the case, and the probabilities must be so strong as, not to exclude all doubt or possibility of error, but as to exclude reasonable doubt," it gave all the definition of reasonable doubt which a court can be required to give, and one which probably made the meaning as intelligible to the jury as any elaborate discussion of the subject would have done. While it is true that it used the words "probabilities" and "strong probabilities," yet it emphasized the fact that those probabilities must be so strong as to exclude any reasonable doubt, and that is unquestionably the law. ***Hopt v. Utah***, 120 U. S. 430, 439: ***Commonwealth v. Costley***, 118 Mass. 1, 23.

Dunbar v. U.S., 156 U.S. 185, 198-99 (1895).

V.

THERE IS NOT A REASONABLE LIKELIHOOD THAT THE JURY IN THIS CASE WAS MISLED

None of the phrases singled out by Victor for criticism, standing alone, present Due Process Clause concerns. Therefore, we must next consider whether these phrases, in the aggregate, and taking the Nebraska Instruction and its companion instructions as a whole, violate the Due Process Clause. We must consider whether under ***Boyde*** and ***Estelle v. McGuire***, "there is a reasonable likelihood that the jury has applied the challenged instruction" in an inaccurate manner. ***Boyde***, 494 U.S. at 380. We think not.

Again, we believe the analytical linchpin of ***Cage*** is the concern of the Due Process Clause with the "evidentiary certainty" of the proceeding. The Nebraska Instruction clearly and repeatedly tells the jury that it is the **evidence** before them, and **only** the evidence before them, which can form the basis of their verdict. The Nebraska Instruction does not permit a verdict based upon "mere possibility, from bare imagination, or from fanciful conjecture." JA 11. The burden of proof is clearly upon the state to establish the accused's guilt in the minds of the jury beyond a reasonable doubt. The Nebraska Instruction taken as an entity or taken in the context of the jury instructions as a whole **does not reduce** or confuse the jury's perception of the state's burden of proof.

In ***Boyde*** this Court aptly stated that ***common sense*** was the key to understanding what reasonable doubt meant in light of the totality of the instructions. There

does not exist a "reasonable likelihood" in the case at bar that Victor's jurors interpreted the trial court's definition of reasonable doubt as lowering the government's burden of proof by misstating the degree of certainty required to convict, or the degree of doubt required to acquit.

CONCLUSION

Because Victor defaulted his due process claim at the trial and on direct appeal, he is not similarly situated with Petitioner in ***Cage*** and may not raise the issue in postconviction proceedings. Even if Petitioner can persuade this Court to allow him to resurrect an issue which he has procedurally defaulted, certain aspects of ***Cage*** cannot appropriately be applied to this or any other case.

We do not challenge the basic premise that due process requires that an explanation of the term "reasonable doubt" must be constitutionally appropriate. However, when the Court applied that concept to specific words and phrases in ***Cage***, it used a now rejected test rather than the "reasonable likelihood" test. Accordingly, until the various words and phrases at issue have been properly evaluated in the context of the instruction as a whole and under a reasonable likelihood test, there is no precedent in ***Cage*** to apply and presumably this Court's older precedents discussing moral certainty and other terms remain effective.

If the Court now applies the reasonable likelihood test to the Nebraska jury instruction and rejects long accepted terms such as "moral certainty" and "strong possibilities", then the Court should, at the same time,

modify ***Griffith*** to provide for an extraordinary disruption of the state criminal justice proceedings exception to the general rule that new rules will be applied to cases which have not yet become final. Because the concept of beyond a reasonable doubt is used in every criminal jury trial, the rejection of long approved explanations of reasonable doubt would have a broader and more disruptive impact than nearly any other new rule might have.

Finally, the Nebraska Supreme Court declined to address the retroactivity issue because it found Nebraska's reasonable doubt jury instruction to be constitutional. Nebraska's reasonable doubt jury instruction repeatedly focuses the jury's attention on the evidence and uses explanatory phrases that have either expressly or impliedly been approved by this Court or other federal courts in the past. The Nebraska Supreme Court's unanimous decision that the Nebraska reasonable doubt jury instruction, **taken as a whole**, does not violate due process should be upheld by this Court.

Respectfully submitted,

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ADDENDUM 1

The court in ***U.S. v. Love***, 767 F.2d 1052, 1060 (4th Cir.), ***cert denied***, 474 U.S. 1081 (1986) ruled that an instruction which referred to reasonable doubt as "reasonable moral certainty" did not warrant reversal. The portion of the instruction in ***Love*** which is similar to the instruction in the present case's use of "moral certainty" read as follows: "reasonable doubt exists in any case when after a careful and impartial consideration of all the evidence, you the jury does [sic] not feel convinced to a reasonable moral certainty that a Defendant is guilty of the charges." ***Id***. 767 F.2d at 1060 n. 10. This above-mentioned reference to "reasonable moral certainty" was not found to have diluted the prosecution's burden of proof, or increased the degree of doubt to acquit. The Second Circuit in ***U.S. v. Magnano***, 543 F.2d 431, 436 n.4 (2nd Cir.), ***cert denied***, 429 U.S. 1091 (1977) held that the trial court's use of moral certainty in its reasonable doubt jury instruction was not found unconstitutional. The phrase "moral certainty" was used in the same manner as Nebraska's instruction, i.e., acquit unless convicted to a moral certainty that no reasonable doubt exists. ***U.S. v. Drake***, 673 F.2d 15, 21 (1st Cir. 1982) (The use of the phrase "moral certainty" is disapproved, but standing alone, does not constitute plain error); ***Hatheway v. Secretary of The Army***, 641 F.2d 1376, 1384 (9th Cir.), ***cert denied***, 454 U.S. 864 (1981) (The use of the phrase "moral certainty" although not ideal, did not obscure or distort the meaning of reasonable doubt); ***U.S. v. Franzese***, 392 F.2d 954, 964-65 (2nd Cir. 1968) (A trial court's explanation to the jury of the phrase "beyond a reasonable doubt to a moral certainty", a term used by defense counsel in

summation, that proof "to a moral certainty" and proof "beyond a reasonable doubt" were essentially equivalents was not constitutionally infirm); ***Bradford v. State***, 412 S.E.2d 534, 536 (Ga. 1992) (Instruction permissible when court only used "moral reasonable certainty"); ***People v. Jennings***, 807 P.2d 1009, 1041-42 (Cal.), ***cert denied***, 125 S.Ct. 443 (1991) (Finding use of term "moral certainty" to be proper); ***Com. v. Beldotti***, 567 N.E.2d 1219, 1225 (Mass. 1991) (Instruction permissible with "moral certainty" language); ***Adams v. State***, 587 So.2d 1265, 1268-69 (Ala.Cr.App. 1991) (Finding permissible use of terms "actual and substantial doubt" and "moral certainty"); ***Smith v. State***, 588 So.2d 561, 567-69 (Ala.Cr.App. 1991) (Finding no error in use of terms "actual and substantial doubt" and "moral certainty").

ADDENDUM 2

None of the individual phrases in question, standing alone, offend the Constitution. It is their specific grammatical use combined with the presence of other arguably problematic phrases which may drag an instruction beyond constitutional propriety.

The use of the phrase "substantial doubt", standing alone, was not found to merit reversal in ***Taylor v. Kentucky***, 436 U.S. 478, 488 (1978).

In ***U.S. v. Fallen***, 498 F.2d 172, 176-77 (8th Cir. 1974), this Court ruled that the jury instruction defining "reasonable doubt" in terms of "substantial doubt" conveyed the proper concept of reasonable doubt where the phrase "substantial doubt" was used only once and "beyond a reasonable doubt" was otherwise explained. In ***Fallen*** it was explained as "the kind of doubt that would make a reasonable person hesitate to act" and "proof of such a convincing character that you would be willing to rely and act upon it unhesitatingly." This same concept is found in the Nebraska Instruction: " 'Reasonable doubt' is such a doubt as would cause a reasonable and prudent man, . . . to pause and hesitate before taking the represented facts as true and relying and acting thereon."

JA 11, Instruction No. 9.

Also, the Third Circuit in ***U.S. v. Smith***, 468 F.2d 381, 383 (3rd Cir. 1972), held that use of the language "substantial reasonable doubt" when viewed contextually, accurately conveyed the concept of reasonable doubt. The Court stated "[r]easonable doubt of itself is substantial, rendering the specific use of the word unimportant. It is

sufficient if the jury understands reasonable doubt to mean 'a real or substantial doubt generated by the evidence or a lack of it.' ***Holland v. United States***, 209 F.2d 516 (10th Cir. 1954)." The present reasonable doubt charge in the same sentence where "substantial doubt" was cited, instructed the jury that the doubt was to arise by the evidence (facts and circumstances shown by the evidence) or the lack thereof.

Moreover, in ***Darnell v. Swinney***, 823 F.2d 299, 302 (9th Cir.), ***cert denied***, 484 U.S. 1059 (1988), the Court of Appeals held that the state trial court's reference to "actual and substantial" doubt in instructing the jury regarding the reasonable doubt standard did not unconstitutionally dilute the prosecution's burden of proof so as to infect the entire trial as to deprive the petitioner of due process; ***See also U.S. v. Delibac***, 925 F.2d 610, 614 (2nd Cir. 1991) (Charge which equated reasonable doubt with "substantial doubt" was not ruled as plain error); ***Hatheway v. Secretary of The Army***, 641 F.2d 1376, 1384 (9th Cir. 1981) (The use of the phrase "substantial doubt" did not obscure or distort the meaning of reasonable doubt); ***Gaskins v. McKeller***, 916 F.2d 941, 952-53 (4th Cir.), ***cert denied***, 111 S.Ct. 2277 (1991) (The trial court's use of the term "substantial doubt", when reviewed in the context of the entire instruction, did not so infect the entire trial that the resulting conviction violated due process); ***Smith v. Bordenkircher***, 718 F.2d 1273, 1277 (4th Cir.), ***cert denied***, 466 U.S. 976 (1984) (Equating "reasonable doubt" with "good and substantial doubt" was not per se unconstitutional, nor was it unconstitutional when taken in context of the entire instruction); ***U.S. v. Zimeri-Safie***, 585 F.2d 1318, 1322 (5th Cir. 1978) (The use of

"substantial" with regard to reasonable doubt is disapproved, but said use of "substantial" did not constitute reversible error); ***U.S. v. Rodriquez***, 585 F.2d 1234, 1241 (5th Cir. 1978) (Although the use of the term "substantial" was not encouraged, when viewed contextually, the use of "substantial" when referring to reasonable doubt did not constitute reversible error); ***Payne v. Smith***, 667 F.2d 541, 546-47 (6th Cir.), ***cert denied***, 456 U.S. 932 (1982) (The use of the phrase "substantial doubt" when referring to "reasonable doubt" was constitutionally adequate); ***U.S. v. Aiken***, 373 F.2d 294, 299 (2nd Cir.), ***cert denied***, 389 U.S. 833 (1967) (Jury charge that a reasonable doubt is doubt based on reason, a substantial doubt and not a speculative doubt, was not erroneous); ***U.S. v. Gratton***, 525 F.2d 1161, 1162 (7th Cir. 1975) (Use of the words "substantial doubt" in referring to "reasonable doubt" did not constitute plain error); ***U.S. v. Breedlove***, 576 F.2d 57, 58-59 (5th Cir. 1978) (When viewed in context of the entire reasonable doubt charge, the language that a "reasonable doubt means an actual, substantial, real doubt arising from the evidence" did not overstate the degree of uncertainty required for reasonable doubt); ***U.S. v. Christy***, 444 F.2d 448, 450-51 (6th Cir.), ***cert denied***, 404 U.S. 949 (1971) (Use of the word "substantial" in regards to reasonable doubt, when used only once and explained that "reasonable doubt" was that which is not a whimsical or capricious doubt but a substantial one, was not error); ***State v. Jones***, 582 So.2d 973, 974-75 (La.App.4 Cir. 1991) (The court found no error with regard to a reasonable doubt jury instruction which equated reasonable doubt with an "actual or substantial doubt"); ***Lord v. State***, 806 P.2d 548, 554 n.1-556 (Nev. 1991) (A reasonable doubt jury instruction which equated

reasonable doubt with the words "actual and substantial" was not ruled as violating the holding of ***Cage***); ***see also Adams v. State, supra***; and ***Smith v. State, supra***.